FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 7 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 523.

CRYSTAL CITY GLASS WORKERS' UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER, CRYSTAL CITY GLASS WORKERS' UNION.

FRED J. HOFFMEISTER,
Counsel for Petitioner.

HENRY H. OBERSCHELP,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Argument 1-9

Summary of Argument.

I.

The stipulation (R. 345-349) between the Board and the company, to which this union was not a party, did not authorize the Board's ruling, decision and order, denying its right as a labor organization to represent its members and precluding its members from having any voice in selecting their representative 1

II.

The Board's history of collective bargaining is not supported by the evidence..... 6

III.

The Board cannot rule one way for a large national labor organization and another way for a small independent union under the same or similar state of facts. It must treat all alike. All are entitled to the equal protection of the laws..... 8

IV.

What the Board decided and ordered as the "unit appropriate" was void because not authorized by the National Labor Relations Act..... 8

V.

If the National Labor Relations Act be held to authorize what the Board did in this case, then it delegated legislative authority in violation of Section 1 of Article I of the Constitution of the United States... 8

VI.

The Board's prejudice, unfairness and wrongful treatment of this union and its members was such as to disqualify it from sitting in judgment on their fundamental rights and render its decision and order void 9

Cases Cited.

N. L. R. B. v. Int'l Shoe Co., 116 F. (2d) 31, l. c. 38... 9
National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 271..... 3
National Labor Relations Board v. Sterling Elec. Motors, 109 F. (2d) 194, aff. 112 Fed. 63, l. c. 69..... 5, 6
National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 361-365..... 3, 4
Yick Wo v. Hopkins, 118 U. S. 356, 373..... 9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 523.

CRYSTAL CITY GLASS WORKERS' UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER, CRYSTAL CITY GLASS WORKERS' UNION.

ARGUMENT.

I.

Throughout these proceedings the Board has acted upon the premise that the prior complaint proceeding adjudicated that this union had no rights as a labor organization. In applying the effect of such alleged adjudication, the Board has refused to hear evidence offered by this petitioner, first, in the representation case (R. 249-250) and,

subsequently, in the complaint case (R. 23-24) to prove among other things that it is a labor organization as that term is defined in the act; that it was not dominated nor interfered with by the company, and that it had bargained collectively for its members with the company until recognition was withdrawn. Further acting upon the alleged adjudication, the Board has refused to give any consideration to wishes of the employees at Crystal City.

The proceedings which are claimed to have resulted in the destruction of this petitioner's rights as a labor organization were instituted by complaint against the company. Before any evidence was taken on that complaint the Board and the company entered into a stipulation (R. 345-349) by which they agreed in effect that the company would withdraw recognition from this petitioner and would comply with the provisions of the act. There are no facts contained in the stipulation or anywhere in the record of the proceedings under consideration from which it could be in any way concluded that this organization had been dominated or interfered with or that it was not a labor organization within the meaning of the act. This petitioner was not a party to those proceedings or to the stipulation and nothing was proved therein against it.

Despite these facts the Board says in its brief at page 33:

> "• • • The effect of the order and decree was permanently to incapacitate the Crystal City Union from representing employees for purposes of collective bargaining with the company and to bar it 'from consideration as an employees' representative.'"

On the next page it is asserted:

> "The fact that the Crystal City Union was not a party to the proceedings did not invalidate the order or change its effect; the company was bound not to deal with that organization, thus rendering it ineligible

to represent the company's employees in collective bargaining. National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 271; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 361-365."

Assuming that the Company and the Board had a legal right to enter into the stipulation in question, their agreement certainly cannot be used as the basis for final adjudication of our rights and there is nothing in the authorities cited which justifies such action.

In the Greyhound case, after a full hearing, the Board, upon convincing evidence, found that the employer had been guilty of unfair labor practices in dominating and interfering with the employees' association and ordered the company to withdraw recognition from the association. In holding that the fact that the Association was not a party to the proceeding did not invalidate the order, the Court said at 303 U. S. 271:

> "As the order did not run against the association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them."

Subsequently this Court in the National Licorice Co. case made it particularly clear that it had not sanctioned any adjudication against the rights of the persons who were not parties to the proceedings. There the evidence showed that, not only had the employer interfered with the rights of its employees, but that it had entered into individual contracts with employees which by their very terms violated the provisions of the act. This Court modified the Board's order, requiring the company to post notices that the contracts "are void and of no effect," so as to make it clear that the action of the Board was directed

against the employer's obtaining any benefits from such illegal contracts. At 309 U. S. 362 the Court said:

> **"It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law."** (Emphasis ours.)

In emphasizing that the Board's action was directed against the employer and that it did not adjudicate the rights of the employees so as to necessitate their being parties, the following appears at l. c. 365:

> "The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. **It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication."** (Emphasis ours.)

From what possible source can the Board be informed as to whether this organization is a bona fide union? No evidence has ever been received by it in any proceeding on this question. Surely at some time before its rights are completely foreclosed we have a right to present the evidence which will show that we have never been dominated or interfered with; that we are a bona fide labor union, and that we are entitled to the rights granted by the act.

The most that can be said of the stipulation and the order based upon it is that it bound the company to withdraw recognition. It leaves this petitioner free to proceed, as soon as the union question is settled, to institute appropriate proceedings to obtain and enforce its rights.

There is nothing in the stipulation which pretends to decide whether the Crystal City Union is entitled to the benefits of the act. But if the company and the Board had expressly agreed that we are a company-dominated union, it would not be binding on us and we would be free to controvert their agreement in any appropriate proceeding.

What the Board did in this case in this connection is so against all sense of fairness, right and justice that argument and citation of cases should be entirely unnecessary. No court would think of condemning a man to death without notifying him, without having him before it, without giving him a hearing, without taking at least some evidence, and yet in this the Board ruled that that stipulation (R. 345-349) between itself and another, to which it was no party, in and of itself killed this union.

Similar conduct of the Board against another independent union so shocked the Court's sense of fairness that in correcting the wrong and requiring it to do justice the Court said:

> "Since our decision of this issue of disestablishment and frustration disposes of the Board's orders as affecting the Association, and since the Board insists on asserting its power to destroy the union without granting it or its members the civil liberty here discussed and has not suggested even now that it will reopen the case as a whole and serve notice on the Association, as its present rule requires, we decide it now. We leave to our later consideration the orders solely affecting the employer. Further to delay with regard to this small self-organized union **might amount to an unfair labor practice on the part of this court,** for in that period the pressure of the Board's order and of its powerful rival well may persuade the men to give up their self-organization as hopeless, and the protection of Section 1 of the Act a vain delusion.

"The Board's petition for enforcement of its order that the respondent employer shall not bargain collectively with the Association and that respondent shall disestablish that union is denied. Decision on the petition for enforcement of other orders of the Board is reserved." (Emphasis the Court's own.)

National Labor Relations Board v. Sterling Elec. Motors, 109 F. (2d) 194, aff. 112 Fed. 63, l. c. 69.

Undoubtedly this union and its members were thus deprived of their life, liberty and property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States, for their employment meant all that to them.

II.

History of Collective Bargaining.

The Board in its brief continues to rely on conclusions which are not supported by evidence and to make assumptions in the guise of inferences that are so tenuous and irrational that, although they are so clevely phrased as to give an appearance of reality, they have no substance whatsoever.

This is particularly true in connection with the finding that the unit fixed by the Board is supported by the history of collective bargaining at Crystal City. An effort is made to have it appear that the finding is supported by three contracts between the company and the federation (Ex. P-1, R. 275; Ex. P-2, R. 282, and Ex. P-3, R. 290, all introduced R. 106). The company has shown at page 29 et seq. of its brief that these contracts by their terms were not operative at Crystal City. However, the Board says Mr. Clause, a company official, testified "* * * that the agreement applied to any members of the Federation at

Crystal City" (Board's Brief p. 24). An examination of that testimony (R. 79 et seq.) discloses that the witness and the company did not regard these contracts as applicable to Crystal City (R. 82):

> "Q. Well, now, then, the only reason that the specific letter of this contract was not carried out, in so far as Crystal City (fol. 132) was concerned, was that you interpreted the contract to mean that that must only apply when there was a majority in the various plants; is that right? A. I think that is right.
>
> Q. Even though the contract does not so specify, that was your interpretation of it? A. That is right."

Although we are anxious that this testimony be understood fairly, it has little importance. The contracts are in writing; they are in evidence and will no doubt be construed by the Court.

There is, however, another reason why the contracts and the testimony concerning them has little bearing on the question: **Even if the contracts had empowered the federation to represent such members, if any, which it had at Crystal City, it never attempted to do so; it did not even claim to have members at Crystal City during the terms of the contracts.**

The federation did not even discuss Crystal City with the company until October 21, 1936. (See testimony of Mr. De Shelter, a national officer of the federation, R. 177.)

History of bargaining has to do with what was done, not with what could have been done; it is useful in determining unit in so far as it shows what the parties have established by their conduct.

Moreover, during the terms of these contracts the Federation claims to have had "probably a dozen" members

at Crystal City (R. 174) out of in excess of 1,500 employees. Could the action of such a small number (less than 1 per cent) establish the history and control the rights of all the others?

III.

The Board must be consistent, treat friend and foe alike. This union and its members were entitled to rulings and findings consistent with those of the Board in the cases shown at page 50 in the company's brief before this Court and more extensively at pages 69-79 in its brief before the Eighth Circuit Court of Appeals.

IV.

What the Board decided and ordered as the "unit appropriate" was not the flat glass division of the company, but what was left of it after there had been emasculated therefrom several entire plants, those at Elwood and Kokomo, Indiana (R. 47), and Works 2, 17, 18 (R. 302), whose location and details are not given, and the clerical employees (R. 55, 447) and the supervisory employees (R. 55, 447) and the window glass cutters, who were only part of the employees in some of the smaller plants (R. 354B, 44, 55, 447). Certainly the employees at Crystal City had as much right to stay out of the C. I. O.'s "Federation" subsidiary as those others. Otherwise they would be denied the equal protection of the laws.

V.

Congress cannot delegate to those who from time to time be the majority of the Board to act arbitrarily and inconsistently, to decide each case according to their own wishes, to favor their friends, to crush the independent.

VI.

The National Labor Relations Board was so unfair in another case that the Circuit Court of Appeals, in denying its petition to enforce its order, said:

> "Once more we observe that extended comment is unnecessary. Indeed, extended comment is impossible, where there is such labored distortion of innocent and harmless remarks, if ever they were made by Nerlich, such distortion as that he is said to have meant the opposite of what actually he said. We do not discuss other slight bits of evidence to which the Board points. They are trifling in importance and their significance either is exaggerated out of all proportion to their true meaning or so distorted as to be given a meaning contrary to the intention of the actors."
>
> N. L. R. B. v. Int'l Shoe Co., 116 F. (2d) 31, l. c. 38.

We respectfully submit even worse was the Board's treatment of the union and its members in this case.

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."
>
> Yick Wo v. Hopkins, 118 U. S. 356, 373.

Respectfully submitted,

FRED J. HOFFMEISTER,
Counsel for Petitioner.

HENRY H. OBERSCHELP,
Of Counsel.